

DECISION



26504
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-212203

DATE: October 12, 1983

MATTER OF: Deere & Company

DIGEST:

1. Protest alleging defects in the solicitation filed initially with the agency prior to bid opening and with GAO after bid opening, but within 10 working days after knowledge of the initial adverse agency action, is timely.
2. A protester, which is a potential competitor if the protest is successful, is an "interested party" although no bid was submitted on the protested solicitation.
3. Protester has not met the burden of showing agency's specifications were in excess of minimum needs or unduly restricted competition.

Deere & Company (Deere) protests as unduly restrictive the specifications in invitation for bids (IFB) No. DAAA31-83-B-0022, issued by the contracting officer, McAllester Army Ammunition Plant, Department of the Army (Army), for a motor grader.

We deny the protest.

Deere initially protested the restrictive specifications on June 13, 1983, to the agency, which denied the protest on June 16, 1983. Bids were opened on June 21, 1983, and the only responsive bid was received from Albert Equipment Company, Inc. (Albert), to which the contract was awarded on the same day because of the critical need for the motor grader. Deere did not submit a bid. The protest was filed in our Office on June 24, 1983.

The Army contends initially that the protest is untimely under section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), because the protest was not received in our Office prior to bid opening.

Prior to February 16, 1983, section 21.2(b)(1) of our Bid Protest Procedures provided that a protest based upon

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alleged improprieties in any type of solicitation which are apparent prior to bid opening must be filed prior to bid opening. Effective February 16, 1983, this section was amended, 48 Fed. Reg. 1931 (January 17, 1983), to provide that if an alleged impropriety in a solicitation is timely protested initially to an agency, a subsequent protest must be filed in our Office within 10 working days of knowledge of the initial adverse agency action.

Deere initially protested the alleged defects in the solicitation to the Army on June 13, 1983. The initial adverse agency action occurred on June 16, 1983, when Army denied the protest, and Deere filed its protest on June 24, 1983, which is less than 10 working days later. The protest therefore is timely.

The Army also contends that Deere is not an interested party to file a protest since Deere did not submit a bid and would not be eligible for award.

Section 21.1(a) of our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1983), requires that in order for a protest to be considered, the protester must be an "interested party." Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. See Kentucky Building Maintenance, Inc., B-196368, January 16, 1980, 80-1 CPD 49.

Thus, a protester may be an interested party if, as here, the remedy would result in amendment or resolicitation, and the protester would be a potential competitor, even though no bid was submitted initially. See Silent Hoist & Crane Co., Inc., B-208386, December 28, 1982, 82-2 CPD 583. Since the remedy for unduly restrictive specifications is amendment of the solicitation or resolicitation, Deere is a potential competitor if the protest is successful and is, therefore, an interested party.

Deere alleges that federal specifications 00-G-630E should cover this procurement and that the specifications requiring (1) 620-cubic-inch engine displacement, (2) direct drive power shift transmission, (3) air actuated oil disc brakes mounted on four wheels, (4) six speeds forward and reverse with both forward and reverse speeds up to 24 miles per hour, (5) 75-gallon capacity fuel tank, and (6) the dimensions set forth in paragraph C.2, subparagraph "i," of

the IFB unduly restrict the road grader to Caterpillar, which was, in fact, the model grader offered by the only responsive bidder.

The Army alleges that the 75-gallon fuel tank capacity is necessary because the motor grader will be operating in remote areas of the ammunition plant which comprises over 45,000 acres on a 4-day, 10-hour work shift, during which fuel will not be readily available. The Army also alleges that an engine smaller than the specified six-cylinder, four-cycle, 620-cubic-inch displacement would require excessive lugging of the engine for performance of the required work resulting in less efficiency and equipment failure due to overload. The specified transmission type is alleged to be necessary for maintenance of railroad crossings and other close tolerance work. The specified speeds are required for efficient and timely operations.

The plant was built during World War II to the minimum, acceptable standards so that ammunition production could begin quickly. The Army asserts that, as a result, problems have been experienced with some graders because of the width of the roads, turning radii of roads, clearance on exterior overchanges, etc. The dimensions were specified because experience has shown those dimensions to be the dimensions which will work.

Air actuated oil disk brakes on four wheels, wheel mounted, are alleged by Army to be necessary for more efficient braking response in the area of ammunition storage and require less maintenance. Also, because of the radius of the roads in the explosive magazine storage areas, the Army asserts that the specified 24-foot turning radius is essential.

Apart from asserting that the specifications are restrictive to Caterpillar, Deere has neither alleged nor shown that the specifications are not necessary for the working conditions.

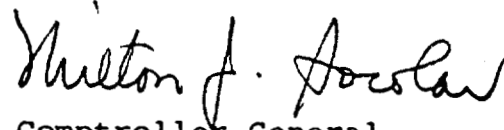
The determination of the government's minimum needs and the best method of accommodating those needs are primarily the responsibility of the contracting agencies. We have recognized that government procurement officials, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future, are generally in

the best position to know the government's actual needs. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. However, when a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. But, once the agency establishes this prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Champion Road Machinery International Corporation, B-206842, B-208487, March 1, 1983, 83-1 CPD 203.

If the specifications represent the legitimate needs of the agency, they are not unduly restrictive because some bidders are unable to meet the requirements, see American Sterilizer Company, B-202096, September 4, 1981, 81-2 CPD 198, or because only one particular product is able to satisfy the requirements. See Amray, Inc., B-208308, January 17, 1983, 83-1 CPD 43.

Deere has failed to meet the burden of showing that the specifications are not reasonably necessary for the stated working conditions.

The protest is denied.

for 
Comptroller General
of the United States